89-599

No.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

**EASTER HOUSE, an Illinois Not-For-Profit Corporation,**

*Petitioner,*

v.

**THOMAS FELDER, FLORENCE McGUIRE and JOAN SATOLOE,**

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## QUESTIONS PRESENTED

1. Whether *Parratt* and its progeny bar a claim based on a denial of procedural due process where high-ranking state officials deprived a citizen of its property without any prior notice or opportunity to be heard which process the officials were empowered and authorized to provide and no emergency or other exigent circumstances existed which would have rendered such pre-deprivation process impracticable.

2. Whether a conspiracy among high ranking state officials to deliberately take a citizen's property without notice and an opportunity to be heard constitutes "random and unauthorized" conduct as those terms are used in *Parratt* and its progeny.

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## OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 879 F.2d 1454 (7th Cir. 1989) (*en banc*) and is reprinted in the appendix hereto filed separately at App. 1. The opinion of the Seventh Circuit which had affirmed the judgment of the District Court is at 852 F.2d 901 (7th Cir. 1988). That opinion was subsequently vacated at 861 F.2d 494 (7th Cir. 1988) pursuant to the Court's granting a rehearing *en banc*. The judgment of the United States District Court for the Northern District of Illinois entered on the jury verdict on June 18, 1986 is reprinted in the appendix hereto filed separately at App. 54-55.

## JURISDICTION

The petitioner invoked federal jurisdiction under 28 U.S.C. § 1331 in the United States District Court for the Northern District of Illinois Eastern Division. On July 11, 1989 the Seventh Circuit sitting *en banc* reversed the jury's verdict on both counts. This court's jurisdiction to review the judgment of the Seventh Circuit is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983 provides in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

Sections 8 and 9 of Child Care Act of 1969;
Ill. Rev. Stat. Ch. 23, §§ 2218 and 2219:

> **§ 2218. Revocation or Refusal to renew licenses—Grounds.]** § 8. The Department may revoke or refuse to renew the license of any child care facility or refuse to issue full license to the holder of a permit should the licensee or holder of a permit:
>
> (1) consistently fail to maintain standards prescribed and published by the Department;

(2) substantially violate any of the provisions of the license issued;

(3) furnish or make any misleading or any false statement or report to the Department;

(4) refuse to submit to the Department any reports or refuse to make available to the Department any records required by the Department in making investigation of the facility for licensing purposes;

(5) fail or refuse to submit to an investigation by the Department;

(6) fail or refuse to admit authorized representatives of the Department at any reasonable time for the purpose of investigation;

(7) fail to provide, maintain, equip and keep in safe and sanitary condition premises established or used for child care as required under standards prescribed by the Department, or as otherwise required by any law, regulation or ordinance applicable to the location of such facility;

(8) refuse to display its license or permit; or

(9) fail to maintain financial resources adequate for the satisfactory care of children served in regard to upkeep of premises, and provisions for personal care, medical services, clothing, education and other essentials in the proper care, rearing and training of children.

**§ 2219. Proceedings to revoke or to refuse renewal of licenses—Notice.]** § 9. Prior to revocation or refusal to renew a license, the Department shall notify the licensee by registered mail with postage prepaid, at the address specified on the license, or at the address of the ranking or presiding officer of a board of directors, or any equivalent body conducting a child care facility, of the contemplated action and that the licensee may, within 10 days of such notification,

dating from the postmark of the registered mail, request in writing a public hearing before the Department, and, at the same time, may request a written statement of charges from the Department.

**Statement of charges—Notice of hearing—Service**

(a) Upon written request by the licensee, the Department shall furnish such written statement of charges, and, at the same time, shall set the date and place for the hearing. The charges and notice of the hearing shall be delivered by registered mail with postage prepaid, and the hearing must be held within 30 days, dating from the date of the postmark of the registered mail, except that notification must be made at least 15 days in advance of the date set for the hearing.

**Findings—Order**

(b) If no request for a hearing is made within 10 days after notification, or if the Department determines, upon holding a hearing that the license should be revoked or renewal denied, then the license shall be revoked or renewal denied. When the Department expressly finds that the continued operation of a child care facility violates any minimum standard prescribed by the Department, as authorized by this Act, or otherwise jeopardizes the health, safety, morals or welfare of children served by the facility, the Department shall include in its order revoking or refusing to renew the license an order of closure directing that the operation of the facility terminate immediately. In this event, the facility may not operate during the pendency of any proceeding for the judicial review of the decision of the Department revoking or refusing to renew the license, except under court order.

**Oaths—Subpoenas—Witnesses**

(c) Upon the hearing of proceedings in which the license is revoked, renewal of license is refused or full license is denied, the Director of the Department, or any officer or employee duly authorized by him in writing, may administer oaths and the Department may procure, by its subpoena, the attendance of witnesses and the production of relevant books and papers.

**Hearing—Continuance**

(d) At the time and place designated, the Director of the Department or the officer or employee authorized by him in writing, shall hear the charges, and both the Department and the licensee shall be allowed to present in person or by counsel such statements, testimony and evidence as may be pertinent to the charges or to the defense thereto. The hearing officer may continue such hearing from time to time, but not to exceed a single period of 30 days, unless special extenuating circumstances make further continuance feasible.

## STATEMENT OF THE CASE

### I. Introduction

This case arose out of an abuse of governmental power by high ranking state licensing officials acting in concert with a private party. After a two week trial involving the testimony of eleven witnesses and over 200 exhibits, the jury found that the high ranking state official defendants, and a private defendant, conspired to deprive Easter House of its property, including its license to operate as a child welfare agency, without any prior notice

or opportunity to be heard in violation of the constitutional guarantees of due process.[1]

## II. The Parties

Easter House, an Illinois not-for-profit corporation,[2] is a licensed child welfare agency engaged primarily in providing adoption services. Thomas Felder was the top state official for the Illinois Department of Children and Family Services ("DCFS") in Cook County during the relevant period, later 1974 and early 1975. As Chief Administrator of this region, Felder directed and was responsible for a vast array of services, but his major responsibility was the licensing of child welfare agencies. Felder was expressly empowered to initiate and carry out enforcement activities, which included the authority and power to revoke or refuse to renew licenses. Specifically, Felder had the authority and power to provide licensees with notice and an opportunity to be heard prior to the revocation of or refusal to renew a license. Felder also had the policy-making power to decide whether he and his staff would follow the procedures set forth in the DCFS' Enforcement Manual. The licensing officials who reported to Felder included the other state official defendants, Florence McGuire, a licensing supervisor, and Joan Satoloe, a licensing representative. (Referred to collectively as the "state officials").

---

[1] The jury also found for Easter House on Count II of its complaint that the state defendants conspired to conduct an unfounded investigation of Easter House in 1976-1977. The Seventh Circuit reversed the judgment on Count II. This Petition for Certiorari concerns Count I only; it does not relate to Count II.

[2] Easter House is not the parent, subsidiary or affiliate of any other entity.

### III. The Conspiracy

In late 1974 and early 1975, Felder, McGuire and Satoloe conspired with Millicent Smith, the then executive director of Easter House, to transfer all of the business and property of Easter House from its rightful owner to Smith. The conspiracy was implemented through a two-part plan. The first part was to quickly deprive Easter House of its license and thereby to effectively destroy its business, at least for a period of time. The second part of the plan was to simultaneously and quickly license and establish Smith's Easter House as a new, for-profit corporation with Smith at the helm.

### IV. The Origin And Implementation Of The Conspiracy Among The State Officials And Smith

The child welfare agency license for Easter House was subject to renewal on December 1, 1974. As part of the renewal process, Satoloe, DCFS' licensing representative for Easter House, conducted a license study of Easter House. Upon the completion of her study, Satoloe issued a recommendation that Easter House's license be renewed for the customary two year period commencing December 1, 1974. Easter House's renewed license was then issued and signed.

Shortly after the renewal of Easter House's license, the conspiracy among Smith and the state officials began. Smith decided to leave Easter House to form her own adoption agency. Smith believed that she and the name "Easter House" were synonymous and she told this to the state officials. Smith also informed Felder, McGuire and Satoloe that it was her intention to take the business and goodwill of Easter House to her new agency. To accomplish those objectives, Smith needed the knowing

assistance and active participation of the state officials possessing the licensing power of the state.

On December 30, 1974, Smith met with McGuire at the DCFS offices. McGuire prepared a memorandum of that meeting and distributed it to Felder on that day and to Satoloe upon her return from vacation a few days later. Among the matters discussed between Smith and McGuire on December 30th were: that Smith had secretly removed all of the active files from Easter House's offices to her new offices without the knowledge of the Chairman of the Board of Easter House and hoped to complete the removal of all of the files before he returned from vacation; that Smith planned to operate her new agency under the same name, Easter House; that Smith was trying to use the same phone number for her new agency that had been used for the old Easter House; that Smith would try to direct the mail of the old Easter House to her new office; and that Smith was essentially going to be operating her new agency as the old Easter House. Smith sent letters to McGuire, Satoloe and Felder the following day thanking them for their assistance, including their heeding the request to withhold the license for Easter House.

The major step in the plan was to deprive Easter House of its license and effectively put it out of business, at least long enough to allow Smith the opportunity to get her agency started. Felder, McGuire and Satoloe met and, having full knowledge of Smith's actions and intentions and in furtherance of their plan, decided to refuse to renew the license of Easter House. On January 6, 1975, Felder sent a certified letter to Easter House refusing to renew its license. Felder was the top-ranking state official of DCFS in Cook County and possessed the state power and final decision-making authority to refuse to renew or to

revoke Child Welfare Agency licenses in his region. The letter officially informed Easter House that it was no longer licensed and that if it wanted to engage in any adoption program it would have to reapply for a new license. Easter House was not given any notice or opportunity to be heard prior to this action.

Although Felder's ostensible reason for revoking Easter House's license was that it no longer had adequate staffing due to Smith's departure, he testified that his action was in violation of the Illinois Child Care Act (Ill. Rev. Stat. Ch. 23, § 2211 *et seq.*) The statutory provision upon which Felder claimed to rely for his action permitted revocation or refusal to renew only where "an agency consistently failed to maintain standards." Felder conceded that, in making his decision, neither he nor his staff ever considered or even attempted to consider whether Easter House consistently failed to maintain standards. Felder also conceded that he disregarded the applicable regulations and manual which required that he and his staff offer assistance to Easter House in obtaining adequate staffing before taking action against its license. The Illinois Child Care Act also required that an agency receive notice and a hearing before DCFS refused to renew or revoke an agency's license. Ill. Rev. Stat. Ch. 23, § 2219.

Although, on January 8, 1975, Felder sent a second letter to Easter House advising Easter House that it had ten days to seek a hearing to review his refusal to renew its license, by that time, as Felder conceded, Easter House had already been officially delicensed. The state officials admitted that the decision and letter of January 6, 1975 terminated Easter House's licensed status.

Additionally, after the January 6, 1975 letter, the state officials took further action to publish the deprivation of

Easter House's license to ensure that the community knew that it was no longer licensed. For example, an attorney called DCFS asking about the status of Easter House on behalf of his clients who were interested in an adoption and was told that his clients should not make any commitments because Easter House was not licensed. Also, on January 10, 1975, Felder contacted Judge Comerford, the Chief Judge in charge of adoptions in Cook County, and notified him that Easter House was no longer licensed.

The state officials also used their deprivation of Easter House's license to sabotage Easter House in its efforts to find a new Executive Director and become relicensed. After terminating Easter House's license, the state officials received an inquiry from a qualified applicant seeking the position of Easter House's Executive Director. He was told that Easter House had no license.

The state officials' deprivation of Easter House's license was an exercise of the State's licensing power which was vested in them. No emergency or exigent circumstances existed which would have rendered pre-deprivation process either impractical or infeasible from the State's perspective.

The sudden deprivation of Easter House's license by the state officials, coupled with Smith's actions, including the removal of all of its active files, virtually shut down the agency. Without a license, Easter House could not perform its primary function of placing children for adoption. Having fulfilled the first part of this conspiracy—depriving Easter House of its license and ability to function—the state officials, together with Smith, carried out the second part which was to make Smith's new agency operational as quickly as possible. So swiftly did the state officials act on the second objective of this conspiracy that

they actually recommended that Smith's agency be licensed long before they completed their standard license study. Additionally, many of the interviews contained in the license and charter studies were fabricated. Also, the State licensing requirement that operators of a child welfare agency be reputable, went virtually ignored in Smith's case. The state officials recommended that Smith be licensed even though they were fully aware that she had stolen all of Easter House's active files and intended to use them in her new agency; she had attempted to direct Easter House's mail to her new agency; she had attempted to reassign Easter House's phone number to her new agency; she was planning to use the Easter House name as the name for her new agency despite the confusion this would generate among the public; and she had unlawfully placed a child for adoption before she was licensed and lied to the state officials about the incident.

Ultimately, after Smith was licensed, established and operating her new agency using the name "Easter House," the petitioner, Easter House was finally given its renewed license. Thus over the course of two and one half months, the state officials, through coordinated action with Smith, had transferred all of the business and property of Easter House from its rightful owner to Smith.

The jury found that the state officials conspired with Smith under color of law to deprive Easter House of its property without due process of law and that each of the state officials and Smith acted with malice. The jury awarded Easter House $150,000 as compensatory damages and assessed punitive damages in the amounts of $5,000 against Felder, $5,000 against McGuire, and $5,000 against Satoloe and $25,000 against Smith.

## REASONS FOR GRANTING THE WRIT

### I.

### THE SEVENTH CIRCUIT'S *EN BANC* DECISION THAT *PARRATT* BARS A CLAIM BASED ON A DELIBERATE DENIAL OF PROCEDURAL DUE PROCESS BY HIGH-LEVEL STATE OFFICIALS PRESENTS A RECURRING, OFT-ANALYZED AND IMPORTANT CONSTITUTIONAL ISSUE WHICH HAS BEEN DECIDED WITH DIAMETRICALLY OPPOSITE RESULTS AND DIFFERENT RATIONALE BY COURTS FROM VIRTUALLY ALL CIRCUITS.

**A. Introduction.**

This case presents a recurring and significant constitutional issue concerning the applicability of *Parratt v. Taylor*, 451 U.S. 527 (1981), and its progeny to cases involving property deprivations caused by high level state officials. This issue has been addressed by almost every Circuit with conflicting results, differing rationale, and without any consensus having been reached.

The Seventh Circuit, which had previously considered this issue in various contexts without any clear resolution, used this case to express its views, *en banc*, on this troubling but important constitutional issue. The Seventh Circuit rejected the interpretation of *Parratt* and its progeny which has been adopted by a majority of the circuits and instead followed the minority view on this issue. The Seventh Circuit held that where the state legislature has enacted statutes and regulations which mandate notice and an opportunity to be heard before depriving a citizen of its property, then any conduct by a state official which deprives a citizen of his property without providing such pre-deprivation process is "random and unauthorized", regardless of the state official's level of authority and control over the decision making process and regardless of

whether providing pre-deprivation process was otherwise practicable. This very broad interpretation of *Parratt*, which was adopted from the Fourth and Fifth Circuits, is in direct conflict with the view of the majority of the Circuits.

The guarantees of the due process clause should not vary dramatically from circuit to circuit. Yet, under the current state of the law, the conduct of the state officials in this case would be a violation of a citizen's procedural due process rights in the Second, Third, Eighth, Ninth, Tenth and Eleventh Circuits, but not in the Fourth, Fifth and now Seventh Circuits.

While we believe that the Seventh Circuit's *en banc* opinion erroneously decides this important issue, we recognize that this court does not ordinarily grant certiorari to merely correct an erroneous decision. The reason certiorari should be granted here is to resolve the direct conflict in the lower courts over this recurring, long-standing, important constitutional issue. This case presents an excellent opportunity for this Court to settle this issue. We will briefly review the conflicting decisions in the various Circuits and the reasoning supporting the opposing views on this important question.

### B. The Conflicting Holdings And Rationale Among The Circuit Courts Need To Be Resolved By This Court.

*Parratt* and its progeny hold that the deprivation of a citizen's property without prior notice and some opportunity to be heard does not contravene the citizen's due process rights under the Fourteenth Amendment where the deprivation was caused by the random and unauthorized act of a state employee and where the state provides adequate post deprivation remedies. The rationale underlying this holding was succinctly stated in *Hudson v. Palmer*, 468 U.S. 517 (1984):

> . . . [W]hen deprivations of property are effected through random and unauthorized conduct of a state employee, pre-deprivation procedures are simply 'impracticable' since the state cannot know when such deprivations will occur. *Id.* at 533.

Thus, *Parratt* recognizes that, while a citizen is normally entitled to received some form of notice and opportunity to be heard before being deprived of his or her property, there are some instances in which the state officials charged with the power and duty to provide such pre-deprivation process are unable to do so because they are not even aware of the deprivation until after it occurs. Under such circumstances the deprivation is beyond the control of these officials thereby making pre-deprivation process "impracticable".

This Court has emphasized that its holding in *Parratt* does not represent a departure from prior due process cases which required notice and an opportunity to be heard before depriving a citizen of his or her property except in certain narrowly drawn circumstances. Except where an emergency or other exigent circumstances exist, pre-deprivation process is still the norm under the Fourteenth Amendment. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436 (1982); *Cleveland Board of Education v. Laudermill*, 470 U.S. 532, 542 (1985). The majority of the Circuits, therefore, have interpreted *Parratt* as providing a sensible but relatively narrow exception to the fundamental guarantees of due process. As the Second Circuit observed in *Patterson v. Coughlin*, 761 F.2d 886, 892 (2d Cir. 1985):

> . . . *Parratt* did not alter the fundamental tenets of due process. Absent some exigency that requires summary action by the state [citations omitted] . . . or circumstances that render a pre-deprivation hearing impossible as a practical matter as in *Parratt*,

> the opportunity to be heard *before* the state deprives an individual of life, liberty, or property is still the 'root requirement' of the due process clause. (Citing *Cleveland Board of Education v. Laudermill*, *supra* at 542).

The specific issue presented by this case, one which has been and continues to be addressed over and over again, is whether *Parratt* and its progeny apply to deprivations caused by high level state officials who possess the state delegated power and authority to provide pre-deprivation process but fail to do so. A majority of the lower courts view the issue as turning upon the practicability of providing pre-deprivation process and hold that neither *Parratt* nor its progeny apply. Courts of the Second, Third, Eighth, Ninth, Tenth and Eleventh Circuits reason that where a state official is a high level decision maker who controls the State's power and authority to provide the required pre-deprivation process but fails to do so, his failure cannot be considered "random and unauthorized" conduct from the State's perspective. Unless exigent circumstances exist, pre-deprivation process is practicable in such circumstances and the officials' failure to provide such process violates due process.

The majority also recognizes that where a lower echelon state employee deprives a citizen of his or her property without pre-deprivation process, the conduct may very well be considered "random and unauthorized" conduct. The importance of the distinction between high level state officials and lower echelon state employees is readily understood when considered in light of the rationale behind *Parratt*. If the state officials who are empowered and authorized to provide pre-deprivation process are unaware that a lower echelon state employee was depriving a citizen of his or her property, it is impracticable for the State

to provide the pre-deprivation process that would otherwise be due and the lower level employee's conduct would therefore be "random and unauthorized." On the other hand, if high level decision making state officials are directly involved in the deprivation it is not "impractical" for the State to provide pre-deprivation process because such state officials are in essence acting as the State and their conduct cannot reasonably be described as "random and unauthorized."

The minority view, as followed by the Fourth, Fifth and now Seventh Circuits, approaches this issue from an entirely different standpoint. These Courts do not focus on the practicability or feasibility of providing pre-deprivation process in a particular case. For example, the Fourth Circuit in *Fields v. Durham*, 856 F.2d 655, 657 (4th Cir. 1988) (pet. for cert. filed Dec. 12, 1988) states:

> "We note at the outset the fact that a pre-deprivation hearing may be practicable does not invariably render *Parratt/Hudson* inapplicable."

Instead, these Courts view the issue exclusively from the standpoint of whether the State, through its legislature and its formalized procedures and practices requires and ordinarily provides pre-deprivation process. If the State's statutes do require pre-deprivation process and there is not a well established state procedure or practice to ignore such laws then, under the minority view, there is no due process violation where a state official deprives a citizen of his property without pre-deprivation process regardless of whether the state official is empowered and authorized to provide such process.

> . . . if the state system, by procedure and in ordinary practice does in fact provide the plaintiff with due process, no violation of the guarantee contained in the national constitution occurs merely because the

> official who randomly deprives him of liberty or property without the hearing required by state law has the power to grant such a hearing. *Holloway v. Walker*, 790 F.2d 1170, 1173 (5th Cir. 1986).

The minority view is based on a stilted interpretation of two sentences in *Hudson v. Palmer*, which state:

> Whether an individual employee himself is able to foresee a deprivation is simply of no consequence. The controlling inquiry is solely whether the *state* is in a position to provide for pre-deprivation process. 468 U.S. at 534. (emphasis in original).

The minority equate the word "state" in the above quoted passage with "state legislature". The majority of Courts interpret that passage of *Hudson* less rigidly.

The majority recognizes the reality that the State acts not only through its legislature but through its key decision makers. As stated in *Dwyer v. Regan*, 777 F.2d 825, 832 (2d Cir. 1985):

> Although the court [in *Hudson*] found crucial the inability of the states to anticipate the actions of the depriving employees, it nonetheless must have recognized that a state, as an incorporeal entity, can establish policy, take action and anticipate events only though its officials and employees. Therefore, we read the *Parratt* and *Hudson* Courts' statement that the states were unable to anticipate the depriving acts of their employees to mean that such anticipation was impossible for the states' more senior officials.

The Eleventh Circuit, *en banc*, also observed in *Burch v. Apalachee Community Mental Health Service*, 840 F.2d 797, 802 n.10 (11th Cir. 1988), *cert. granted*, ___ U.S. ___, 109 S.Ct. 1337 (1989):

> We read *Hudson v. Palmer* as saying that state officials' ability to predict the need for pre-deprivation process (i.e. '*can* provide pre-deprivation process')

> does not remove the case from *Parratt*'s reach. Rather *Hudson v. Palmer*, requires that 'the state [b]e in a position to provide for pre-deprivation process.' . . . where as here the state has reposed its power and concomitant duty with the state officials, state officials act *as* the state and thus the state is in a position to provide for pre-deprivation process.

The majority of courts interpret the "State" to encompass not only its laws and procedures, but the officials who are empowered to carry out those laws and procedures as well. This view is more consistent with the traditional concept of due process. As stated by the Second Circuit:

> Allegations of procedural due process violations by certain individual government employees, as opposed to direct challenges to state procedures or the lack thereof, have long been accepted as constituting state action and forming the basis for a claim under the civil rights statutes (citations omitted). The requirements of the due process clauses are directed specifically to the federal and state governments. They require the promulgation of laws and regulations providing for regular procedures which the government must follow before it may deprive an individual of life, liberty or property. The execution of those laws and regulations also must conform to due process, otherwise the due process clause, with its guarantees of regular and predictable procedures becomes a cipher. It is beyond cavil that due process requires more than the mere *promulgation* of laws and regulations which, if followed, would preserve the most fundamental of rights. *Patterson v. Coughlin*, *supra* at 891. (emphasis in original).

The results and the rationale behind the majority view and the minority view are diametrically opposed. These two distinctly different views have emerged from several years of decisions considering and deciding Section 1983 claims involving procedural due process issues. The ten-

sion between those two opposing views requires this Court's resolution.

### C. The Second, Third, Eighth, Ninth, Tenth And Eleventh Circuits Recognize That Property Deprivations Caused By High Level State Officials Possessing The Power To Provide Pre-Deprivation Process, But Who Fail To Do So, Cannot Be Viewed As Random And Unauthorized Conduct Under *Parratt* And Its Progeny.

A sampling of some of the decisions from each of the Circuits following the majority view demonstrates the length of time and frequency that this issue has been percolating in the lower courts, the depth of analysis and reasoning which has been given to the issue, and the principles which have emerged from the majority of the Circuits addressing it.

The Second Circuit has a number of well-reasoned decisions focusing on this issue. *Dwyer v. Regan*, 777 F.2d 825 (2d Cir. 1985); *Patterson v. Coughlin*, 761 F.2d 886 (2d Cir. 1985) *cert. denied*, 474 U.S. 1100 (1986); *RR Village Association Inc. v. Denver Sewer Corp.*, 826 F.2d 1197 (2d Cir. 1987). In *Dwyer* the Second Circuit rejected the argument that the "State" could not have anticipated the acts of the state official defendants because such acts were in direct contravention of established state law. The court stated:

> We reject this view principally because it ignores the difference between lower echelon state employees such as those in *Parratt* and *Hudson* and high ranking state officials such as *Regan*.

In *Patterson*, *supra*, the Second Circuit found that the pertinent inquiry under *Parratt* and *Hudson* "is whether the conduct of the state's agent that resulted in the deprivation was such as to make the injury unforeseeable when

viewed from the position of one who possesses the state delegated authority to grant a hearing when circumstances and the constitution so require." *Id.* at 892.

Likewise the Third Circuit has consistently held that where a citizen is deprived of his property without any pre-deprivation process such conduct is not "random and unauthorized" when it is taken by "an official in a supervisory position acting within the area of his authority. . . ." *Stana v. School District of Pittsburgh*, 775 F.2d 122, 130 (3d Cir. 1985). The Third Circuit observed in *Stana*:

> "On the other hand, if it were possible for the state or its entity to know that the deprivation was about to occur, the state could have provided pre-deprivation process. Patently, when the acts at issue were those of an official in a supervisory position, acting within the area of his authority, the governmental entity could have provided some pre-deprivation process." *Id.* at 130.

The rationale and holding in *Stana* was also followed by the Third Circuit in *Brown v. Trench*, 787 F.2d 167 (3d Cir. 1986).

The Eighth Circuit also follows the majority view. In *Freeman v. Blair*, 793 F.2d 166 (8th Cir. 1986), *vacated on other grounds*, ____ U.S. ____, 107 S.Ct. 3254 (1987), the Eighth Circuit concluded that neither *Parratt* nor *Hudson* precluded a Section 1983 claim based on a violation of procedural due process against senior level state officials who had suspended, without any pre-deprivation process, plaintiff's license to operate a campground. Focusing on whether providing pre-deprivation process was practical and feasible, the Eighth Circuit stated:

> "Surely decisions made by the highest officials in the executive branch of state government who have final authority over matters for which they are responsible do not constitute 'random and unauthorized' acts.

> [Citations omitted]. The state officials in this case who decided to search [plaintiff's] campground without a warrant and to suspend the [plaintiff's] campground license when they refused to submit to that search were senior level officials. These officials knew what actions were going to be taken because they were responsible for making the decisions. Consequently a pre-deprivation hearing easily could have been provided. *Id.* at 177.

*See also Moore v. Warwick Public School District*, 794 F.2d 322 (8th Cir. 1986). (*Parratt* applies only where an act is "random and unauthorized" and pre-deprivation process is not only impracticable but impossible).

The Ninth Circuit has also followed the majority view that *Parratt* does not govern in instances where the state, acting through its officials, is in a position to provide pre-deprivation process. *Merritt v. Mackey*, 827 F.2d 1368, 1372 (9th Cir. 1987); *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 864 F.2d 1475, 1482 (9th Cir. 1989) (*Parratt* does not apply to a decision made by senior state officials acting under the authority granted them by state statute). Also, in *Bretz v. Kelman*, 773 F.2d 1026 (9th Cir. 1985) (*en banc*), discussed more fully below, the Court held *Parratt* inapplicable to a claim against local officials who were engaged in a "direct abuse of the state process itself." *Id* at 1031.

The Tenth Circuit is also among the majority on this issue. In *Lavicky v. Burnett*, 758 F.2d 468 (1985), *cert. denied*, 474 U.S. 1101, (1986) the Court held plaintiff's procedural due process rights were violated when his property was seized without a hearing. The Court concluded that because it was not impractical for the defendant state officials to hold the required pre-deprivation hearing, *Parratt* and its progeny were inapplicable. *See also Wolfenbarger v. Williams*, 774 F.2d 358 (10th Cir. 1985) (because

of authoritative position occupied by district attorney his conduct cannot be considered "random and unauthorized").

The Eleventh Circuit has considered the issue in a number of cases and has consistently followed the majority view. *Messick v. Leavins*, 811 F.2d 1439 (11th Cir. 1987) (Neither *Parratt* nor *Hudson* preclude procedural due process claim against local officials who destroyed Plaintiff's property without notice or opportunity to be heard); *Fetner v. City of Roanoke*, 813 F.2d 1183 (11th Cir. 1987) (procedural due process claim overcame *Parratt* challenge where city officials discharged plaintiff without notice and opportunity to be heard). The Eleventh Circuit has also reviewed this issue *en banc* in *Burch v. Apalachee Community Mental Health Services*, 840 F.2d 797 (11th Cir. 1988) (that case is presently being considered by this Court on another issue and is scheduled for argument on October 11, 1989).

While the Sixth Circuit has not expressly adopted either the majority or minority views, it has agreed at least in principle, with the majority that "impracticability" is the key to assessing the application of *Parratt*. In *Stachura v. Truszkowski*, 763 F.2d 211, 215 (6th Cir. 1985), *rev'd on other grounds*, 474 U.S. 918 (1986), the Court found *Parratt* inapplicable to a procedural due process claim against local school board officials who discharged plaintiff without a hearing. The Court stated:

> The holding in *Parratt* that the provision of post-deprivation remedies by state courts will, in some cases, suffice to provide all the process due in property deprivation claims applies only where, as in *Parratt*, 451 U.S. at 540-542, a pre-deprivation hearing was 'impracticable' or 'impossible.' Here a pretermination hearing was both practical and feasible.

**D. The Fourth, Fifth And Now The Seventh Circuits Have Adopted A Minority View Which Ignores The Question Of Whether Pre-Deprivation Process Was Practicable Or Feasible And Instead Focuses Only On Whether The State Laws And Procedures Provide For Pre-Deprivation Process.**

The minority view is followed by the Fourth, Fifth and now the Seventh Circuits. Again, courts within these Circuits have considered and analyzed the issue presented in this case. Unlike the majority of jurisdictions however, the minority focus on whether the State has, through its laws and procedures, provided for pre-deprivation process not whether the state officials, empowered to act on behalf of the State, comply with such procedures and provide the process which should be due. This view, which ignores the rationale of *Parratt* and its progeny concerning the "impracticability" of providing pre-deprivation process, is directly opposite to that of the majority of its Circuits.

The Fifth Circuit has directly addressed the issue presented by this petition in *Holloway v. Walker*, 790 F.2d 1170, 1173 (5th Cir. 1986). The Fifth Circuit held that it makes no difference whether the state official who deprives a citizen of his property without pre-deprivation process is a high ranking state official who possesses the power and authority of the state to provide such process. The Court in *Holloway* expressly rejected the reasoning of the majority as reflected by the Second Circuit's decision in *Patterson v. Coughlin, supra.*

The *en banc* decision by the Seventh Circuit in this case expressly relies on and follows the Fifth Circuit's decision in *Holloway.* The Seventh Circuit's opinion is directly opposed to the holdings in the majority of circuits. As stated in its *en banc* opinion:

> "The inquiry which the Supreme Court deems relevant is whether the employee's actions were random and unauthorized from the state's perspective, not whether the employee held any certain position in the governmental hierarchy. Thus we refuse to hold that *Parratt* and its progeny do not apply in cases involving a high ranking state or local official's failure to provide the due process protection when that official has the authority and duty to do so." 879 F.2d 1458, 1472 (7th Cir. 1989) (*en banc*).

Under the minority view, as long as the state has adopted statutes requiring that pre-deprivation process be provided to its citizens, top level state officials can use the governmental power vested in them to deliberately take a citizen's property without providing any of the requisite pre-deprivation process and be free from any liability under 42 U.S.C. § 1983. Under the minority view such a classic abuse of governmental power does not violate the constitutional guarantees of due process if the state has adequate post-deprivation "tort" remedies which can be pursued in its state courts.

Such a view, which petitioner contends constitutes a dramatic departure from traditional and fundamental concepts of procedural due process, should not be allowed to control the rights of citizens in the Fourth, Fifth and Seventh Circuits without such principles having been considered and either approved or rejected by this Court.

### E. This Petition Presents An Excellent Opportunity To Address And Resolve This Significant Conflict Among The Circuits On An Important Constitutional Issue.

While we respectfully disagree with the view followed by the minority of Circuits on this issue, it nonetheless is clear that two plainly opposite views have emerged. The deprivation of property by high level state officials

without any pre-deprivation process is actionable under § 1983 as a violation of a citizen's procedural due process rights in the Second, Third, Eighth, Ninth, Tenth and Eleventh Circuits but it is not actionable as a violation of procedural due process in the Fourth, Fifth and Seventh Circuits. This issue has been percolating for several years and further decisions will not illuminate this issue any more clearly or result in a consensus of views on this subject. This Court should act now to resolve this serious conflict.

This particular case is an excellent opportunity for this Court to resolve this conflict. The Seventh Circuit considered this single issue important enough to justify an *en banc* rehearing and reversal of a case which had been resolved favorably to the plaintiff after a jury trial based upon substantial evidence, and which had already been affirmed by a panel of the Seventh Circuit. Yet, because of the significance of this *Parratt* issue and the clarity of the facts on that issue, the Seventh Circuit reheard the case *en banc*. The dissent from the *en banc* majority opinion expressly invites this Court to revisit this issue to resolve the conflict among the Circuits. Regardless of whether the Seventh Circuit view is right or wrong, this court should grant certiorari to answer the question presented.

## II.

## THE SEVENTH CIRCUIT'S *EN BANC* HOLDING THAT A CONSPIRACY AMONG STATE OFFICIALS CONSTITUTES "RANDOM AND UNAUTHORIZED" CONDUCT ALSO CONFLICTS WITH HOLDINGS FROM OTHER CIRCUITS.

The Seventh Circuit held that the state officials conduct was random and unauthorized even though the deprivation here was shown to be the result of well planned

conspiracy involving high ranking state officials who controlled the decision-making power of the state concerning the licensing of child welfare agencies. The Seventh Circuit's holding directly conflicts with the holdings of the Third and Ninth Circuits.

In *Bretz v. Kelman*, 773 F.2d 1026 (9th Cir. 1985) (*en banc*), the Ninth Circuit held that *Parratt* and its progeny were inapplicable to a claim that defendants had conspired to falsely accuse and prosecute him for burglary by committing perjury, threatening and coercing witnesses and concealing and falsifying evidence. The Court found *Parratt* inapplicable in such circumstances because a conspiracy, by its very nature, cannot be random.

The Third Circuit, in *Labov v. Lalley*, 809 F.2d 220 (3d Cir. 1987), also applied the *Bretz* reasoning to a conspiracy claim against various local officials who were alleged to have conspired to deprive plaintiffs of their employment interests and related benefits in retaliation for the exercise of their First Amendment rights. The Court held *Parratt* and its progeny do not apply to charges of deliberate conspiratorial conduct of state officials. *Id.* at 223.

> "Such conduct if it can be proved is not the kind of isolated unpredictable, and thus unpreventable conduct with which the Supreme Court purports to deal in the *Parratt v. Taylor* line of cases. *Id.*

In the instant case, Petitioner proved the existence of a multi-faceted conspiracy among high level officials of the state government to deprive Petitioner of its property rights without any due process. The Seventh Circuit in applying *Parratt* and its progeny expressly rejected the holdings in *Bretz* and *Labov*. Instead, it adopted the holdings of the Fifth Circuit in *Holloway v. Walker*, *supra*, and the Sixth Circuit in *National Communication v. Michigan Public Service*, 789 F.2d 370 (6th Cir. 1986).

In *Holloway* the court disagreed with the Ninth Circuit's holding in *Bretz* and held that a conspiracy, even among high level officials, can be random and unauthorized. The Court concluded that the *Bretz* conspiracy, while it may not have been random from the perspective of the state officials, it was random from the perspective of the state because the state had laws proscribing such conduct.

The Seventh Circuit's *en banc* decision, and the decisions in *Holloway* and *National Communication Systems, Inc.* on the issue of whether *Parratt* and its progeny apply to conspiratorial conduct among state officials clearly raises a direct conflict with decisions in the Third and Ninth Circuits. The conspiracy in the instant case, like the conspiracy in both *Bretz* and *Labov*, involved a "direct abuse of the state process itself." *Bretz, supra* at 1031. The respondents here were in charge of the state's licensing apparatus and abused their positions of power and the system they were empowered to oversee.

Thus, this case presents this Court with the opportunity to resolve two questions relating to the same basic issue, both of which questions require the interpretation of *Parratt* and its progeny and both of which are the subject of conflicting decisions among the Circuits.

## CONCLUSION

All pertinent criteria which should be explored to determine whether certiorari should be granted are met in this case. A very real and direct conflict exists among the circuits. The conflict has existed for several years. Numerous lower courts have considered the issues from several different factual perspectives, and certain common questions

emerge from those decisions which are answered differently depending on where the citizen resides. The issues involve fundamental constitutional guarantees and can only be resolved by the Supreme Court. Postponing the resolution of this conflict and constitutional controversy only weakens the Constitution and the public's ability to understand their rights and pursue their remedies. The issues presented here should be decided by this Court, and the conflict which has been percolating for several years should be resolved.

Respectfully submitted,

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